Supreme Court, U.S.
FILED
DEC - 1 2003
OFFICE OF THE CLERK

03-218

IN THE

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,
Petitioner,

—v.—

AMERICAN CIVIL LIBERTIES UNION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF MORALITY IN MEDIA, INC., IN SUPPORT OF PETITIONER

PAUL J. MCGEADY
Counsel of Record
MARY MCNEILL
Of Counsel
Morality in Media, Inc.
475 Riverside Drive
New York, New York 10115
(212) 870-3232

24 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE THIRD CIRCUIT ERRED IN ITS HOLDING THAT COPA IS NOT NARROWLY TAILORED 4

a. MATERIAL HARMFUL TO MINORS 4

b. CONSIDERED AS A WHOLE 5

c. PRURIENT INTEREST, PATENT OFFENSIVENESS AND SERIOUS VALUE 9

II. THE TERMS 'COMMERCIAL PURPOSES' AND 'REGULAR COURSE OF BUSINESS' IN COPA ARE NOT OVERBROAD 11

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986)..... 18

ACLU v. Ashcroft, 322 F.3d 240 (3rd Cir. 2003)..... 4,8, 11, 15

ACLU v. Reno (Reno III), 217 F.3d 162 (3d Cir. 2000)..... 4

Ashcroft v. ACLU, 535 U.S. 564 (2002) 5

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)..... 8

Blake v. Wilson, 268 Pa. 469, 112 A. 126 (Pa. Sup. Ct. 1920)..... 14

Callihan v. Montgomery, 272 Pa. 56, 115 A. 889
(Pa. Sup. Ct. 1922) 15, 18

Cochrane v. William Penn Hotel, 140 Pa. Super. 323,
13 A.2d 875 (Pa. Super. Ct. 1940) 15

Eckstein v. Cullen, 803 F. Supp. 1107 (E.D. Va. 1992)..... 13, 18

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) 13, 18

Ginsberg v. New York, 390 U.S. 629 (1968)..... 3, 9, 10, 17

Goocher v. State, 633 S.W. 2d 860 (Tex. Crim. App. 1982)..... 7

Gooden v. Mitchell, 41 Del. 301, 21 A.2d 197
(Del. Sup. Ct. 1941)..... 15

Grayned v. City of Rockford, 408 U.S. 104 (1972) 13

Guillara v. Liquor Control Commission, 121 Conn. 441,
185 A. 398 (Conn. Sup. Ct. 1936)..... 15

Jenkins v. Georgia, 418 U.S. 153 (1974) 5

Kois v. Wisconsin, 408 U.S. 229 (1972)..... 3, 7, 8, 9

M.S. News Co. v. Casado, 721 F.2d 1281 (10th Cir. 1983) 16

Memoirs v. Massachusetts, 383 U.S. 413 (1966) 17

Miller v. California, 413 U.S. 15 (1973)..... 9, 13, 17

Palmer v. Hoffman, 318 U.S. 109 (1943)..... 12

Passarelli v. Monacelli, 121 Pa. Super. 32, 183 A. 65
(Pa. Super. Ct. 1935)..... 14

Rees v. State, 909 S.W.2d 264 (Tex Ct. App. 1995)..... 5, 7

Roth v. United States, 354 U.S. 476 (1957)..... 17

Scanlon v. Hartman, 282 Ore. 505, 579 P.2d 851
(Ore. Sup. Ct. 1978)..... 15

Sgattone v. Mulholland & Gerwals, 290 Pa. 341, 138 A. 855
(Pa. Sup. Ct. 1927) 14

Smith v. California, 361 U.S. 147 (1959)..... 18

United States v Gross, 313 F.Supp. 1330 (S.D. Ind. 1970)..... 13

United States v. Merrill, 746 F.2d 458 (9th. Cir. 1984) 7

United States v. Skinner, 25 F.3d 1314 (6th Cir. 1994)..... 13

Upper Midwest Booksellers Assoc. v. Minneapolis,
780 F.2d 1389 (8th Cir. 1985) 16

Vernon Beigay v. Traxler, 790 F.2d 1088 (4th Cir. 1986)..... 13

Vescio v. Pennsylvania Elec. Co., 336 Pa. 502, 9 A.2d 546
(Pa. Sup. Ct. 1939) 15

STATUTES

CHILD ONLINE PROTECTION ACT (COPA) 47 U.S.C. §231 ... *passim*

SECTION 484-h, NEW YORK PENAL CODE 10

18 U.S.C.S. 1466 ..... 12, 13

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY 1451 (4th ed. 1968) 14

BLACK'S LAW DICTIONARY 356 (7th ed. 1999) 14

FREDERIC C. SCHAUER, THE LAW OF OBSCENITY, 108-109, (BUREAU OF NATIONAL AFFAIRS, INC., 1976) 6

NEW WEBSTER'S DICTIONARY AND THESAURUS OF THE ENGLISH LANGUAGE 132 (1992) 14

INTEREST OF *AMICUS CURIAE*

Morality in Media, Inc., as *amicus curiae*,[1] files this brief in support of the Petitioner in this case, which is before this Honorable Court on the merits under the provisions of Rule 37. The written consents of the parties were requested and all parties have consented in writing to the filing of this brief. Copies of the written consents are being filed concurrently with this brief.

Morality in Media is a New York, not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states. Its Board of Directors and Advisory Board are composed of prominent businessmen, clergy, and civic leaders. The Founder and President of MIM (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He and Dr. Winfrey C. Link produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography," which was cited by this Honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4 (1973) and in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 notes 7 and 8 (1973).

Morality in Media has an interest in this case because it specializes in providing assistance on issues related to the laws of obscenity, child pornography, broadcast indecency,

---

[1] This *Amicus Curiae* brief was authored in whole by Counsel of Record Paul J. McGeady and Of Counsel Mary McNeill of Morality in Media, Inc. and no part of the brief was authored by any attorney for a party. No person or entity other than this *amicus curiae*, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief. Rule 37 (6).

and the display and dissemination of materials that are harmful to minors. Morality in Media filed a joint brief with the American Catholic Lawyers Association in the Third Circuit below as *amici curiae* in support of the government's position, and in *Ashcroft v. American Civil Liberties Union, et al.*, 535 U.S. 564 (2002).

Morality in Media has filed friend of the court briefs in this Court involving First Amendment issues, including: *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *United States v. Playboy*, 529 U.S. 803 (2000); *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *City of Los Angeles v. Alameda Books, Inc. and Highland Books, Inc.*, 535 U.S. 425 (2002).

Amicus files this brief in support of the Petitioner because it believes our brief contains relevant matter and alternative arguments that may not be presented to the Court by the parties.

SUMMARY OF ARGUMENT

Amicus contends that the Third Circuit's holdings on remand that the Child Online Protection Act ("COPA") is not narrowly tailored because: - (1) it is not limited geographically; (2) the terms "harmful to minors" and "minors" are vague and overbroad; (3) COPA requires that pictures and images be considered in isolation and; (4) the terms "commercial purposes," and "engaged in the business" are overbroad – all fail in light of the definitions in the statute and well-established law.

The first objection, to the effect that COPA is not limited geographically, has been disposed of by the opinion of this Honorable Court when it remanded the matter to the Third Circuit.

The contention that COPA's language relating to the term "harmful to minors" is unconstitutionally vague, overbroad and not narrowly tailored is answered by the fact that comparable language was upheld by this Honorable Court in *Ginsberg v. New York*.

The third contention that images and pictures must, under the statute, be considered in isolation is met by the "taken as a whole" language of the statute, and the requirement in *Kois v. Wisconsin* that matter "rationally related" also be considered in determining what is meant by "taken as a whole."

Amicus shows finally, that the statute's language on the word "minor" and the phrases "commercial purposes" and "regular course of business" is neither vague nor overbroad.

Amicus also notes that COPA is a type of an obscenity statute where strict scrutiny is not required.

ARGUMENT

I. THE THIRD CIRCUIT ERRED IN ITS HOLDING THAT COPA IS NOT NARROWLY TAILORED.

The Third Circuit on remand held that COPA is not "narrowly tailored" in its use of the phrases, "material that is harmful to minors," "taken as a whole," "prurient interest," and "lacks serious literary, artistic, political, or scientific value for minors."[2]

(a) Material Harmful to Minors

One of the court's narrowly tailored objections relating to "Material Harmful to Minors" reads as follows:

> When contemporary community standards are applied to the Internet, which does not permit speakers or exhibitors to limit their speech or exhibits geographically, the statute effectively limits the range of permissible material under the statute to that which is deemed acceptable only by the most puritanical communities. This limitation by definition burdens speech otherwise protected under the First Amendment for adults as well as for minors living in more tolerant settings. *See Reno III*, 271 F. 3d at 173-80.[3]

[2] Child Online Protection Act (COPA) 47 U.S.C. §231(e)(6).
[3] *ACLU v. Ashcroft*, 322 F.3d 240 at 252, 3rd Cir (2003).

Amicus contends that the court's language admits of no interpretation other than that the court still believes that "community," as used in COPA, requires restriction of community standards to a precise geographical area. The Supreme Court has rejected this contention in *Ashcroft v. ACLU*, 535 U.S. 564 (2002), quoting *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974).

(b) Considered as a Whole

The Third Circuit makes much of the contention that COPA's "taken as a whole" provision, in effect, requires consideration of images in isolation rather than in context. This appears to be a non sequitur. There is nothing in the statute that says that each image is the "whole." Supreme Court jurisprudence requires the consideration of context in order to determine the "whole", whether it be a motion picture, video, book, play, picture, broadcast, or internet transmission. Obviously, a well-instructed jury will take context into consideration in determining the whole provided that there is a thematic connection between the picture, image, file, article, recording or other matter of any kind and the other depictions or descriptions that comprise the context.

Rees v. State,[4] is a case in point (that specifically considers the "taken as a whole" concept as applied to television programming) that can properly be applied to the Internet. Here, the Court of Appeals of Texas (3rd Dist., Austin) held that: a sexually explicit film titled, "Midnight Snack", which was shown on a Cable TV program called "Infosex", could be separately considered apart from the entire program and determined to be obscene.

[4] 909 S.W.2d 264 (1995) *cert. denied* 519 U.S. 863 (1996)

The court quotes a work of author Frederic C. Schauer titled "The Law of Obscenity" for the meaning of "taken as a whole" as employing a "thematic unit" concept. In Schauer's work, we find the following:

> It has... been suggested that, in general, the entire 'physical item' that is, book, magazine or other item, be looked at as a unit. If the 'physical item' test were rigidly applied, however, it would be far too easy to include hard-core pornography as one article in a magazine that also contained excerpts from the writing of D.H. Lawrence or James Joyce. It would be more appropriate for the court, and the trier of the fact, to make an evaluation in every instance as to the intended or likely 'unit of perception'. A magazine article, or a single book, or a motion picture, are intended to be seen or read as a unit, and should therefore be evaluated as such. So also when articles or stories are clearly interrelated and it is intended and expected that they will be perceived as a unit. But magazine 'articles' with no connection except that of dealing with the same general subject matter are not necessarily likely to be seen or read together, and should therefore be evaluated separately.[5]

[5] Frederic C. Schauer, The Law of Obscenity, 108-109 (Bureau of National Affairs, Inc., 1976)

The *Rees* case also interprets *Kois v. Wisconsin*, [6] and says that it indicates:

> That the work to be taken as a whole should be measured in thematic units and not in physical units... The court did not decide whether the pictures alone were obscene or whether the newspaper in its entirety must be considered because the article and the pictures were rationally related.

This court also refers us to *Goocher v. State*,[7] where Judge Clinton used the term "Unit of Perception," applying a "thematic unit" concept and to *United States v. Merrill*,[8] where the Ninth Circuit held that a constitutionally protected letter enclosing two obscene playing cards was not thematically connected.

Since COPA did not define each species of material as a whole, *Kois v. Wisconsin* and related cases require that items be thematically connected to be considered together as a whole. While it is true that *Kois* uses the phrase "in the context", it goes on to say of the pictures:

> In the context in which they appeared in the newspaper, they were rationally related to the theme of the article.

It can be seen that the word "context" does not exist in a vacuum. In other words, a jury could not be instructed to

[6] 408 U.S. 229 (1972).
[7] 633 S.W. 2d 860, (Tex. Crim. App. 1982), appeal dismissed, 459 U.S. 807 (1982).
[8] 746 F.2d 458, (9th Cir. 1984)

look at the allegedly obscene items "in context" without a further instruction "to determine if the allegedly obscene depiction or description were rationally related" to the theme of a protected depiction or description. The governing rule in *Kois* in determining context is "thematic relationship." Since this is so, it is not necessary to consider the alleged obscene or alleged harmful to minors item in the "context", of "a whole Web page," an "entire multipage Web site" or an "interlocking set of Web sites,"[9] unless the allegedly offending item is rationally related to the theme of said Web page or multipage Web site, etc. It seems improbable that there would be a rational relationship to a theme of the *internet* or *interlocking Web sites*. In fact, it is doubtful that even an entire Web site, that is otherwise protected, would be thematically rationally so related. We are probably looking at a possible thematic rational relationship to a Web page or pages. [10]

In all events the *Kois* rule is applicable and provides the narrow tailoring if such be necessary.

The Third Circuit quoting *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 248 (2002) states:

> Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive.

[9] *ACLU v. Ashcroft, supra* at 252 (3rd Cir): "As Justice Kennedy observed in his concurring opinion in *Ashcroft*, the application of the constitutional taken 'as a whole' requirement is complicated in the Internet context: 'It is unclear whether what is to be judged as a whole is a single image on a Web page, a whole Web page, an entire multipage Web site, or an interlocking set of Web sites.'"

[10] In this respect, a*micus* differs from the suggestion of Petitioner in this case that "individual pictures or articles on a Web site should generally be examined in the context of the entire Web site." (Reply Brief for Petitioner in its Petition for Certiorari in this matter at page 3).

If the court had continued to quote from *Free Speech Coalition*, it would find that immediately after the word "offensive" in the above-referenced quote, this Honorable Court said, "see *Kois v. Wisconsin,* 408 U.S. 229, 231 (1972)", indicating that we should look to the *Kois* concept of a rationally related theme.

We submit that the *Kois* rule would apply to determine the whole and that the statute is narrowly tailored by such application without the necessity of defining "taken as a whole". It is noted that *Miller v. California*[11] did not define "taken as a whole," although it used the phrase twice.

(c) Prurient Interest, Patent Offensiveness and Serious Value

The statute defines the term "minor" as any person less than 17 years of age. The Third Circuit found this constitutionally infirm as including all minors without a distinction as to age and finds the statute, for this reason, unconstitutional in the application of the Prurient Interest, Patently Offensive and Serious Value prongs in COPA.

The difficulty with the Third Circuit opinion in this regard is the fact that the United States Supreme Court in *Ginsberg v. New York*[12] has already ruled on the validity of New York's Harmful to Minor's Statute, which makes no distinction as to the age of minors except that a minor is a

[11] 413 U.S. 15 (1973)

[12] 390 U.S. 629 (1968).

person under the age of 17 years. This ruling, of this Honorable Court, indicates that COPA, which covers all minors under 17, is also constitutional in this respect.

The *Ginsberg* Court upheld a definition remarkably similar to the "Harmful to Minors" language at issue here. The Court referred to all such as "children" and indicated that material that can be held obscene for children may not be obscene for adults. There was no separation of older or younger minors. *Amicus* submits that under the *Ginsberg* rationale, no separation is necessary. The fact that those of age 17 and older are treated under the statute as adults is sufficient to protect the free speech rights of older minors. Those 16 and under are treated by the *Ginsberg* Court and by Congress in this statute as children deserving special protection. Congress in its wisdom and not the court is the logical body to draw the line.

A significant quote from *Ginsberg* [13] reads:

> To sustain state power to exclude material defined as obscenity by Section 484-h requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute *is* "harmful to minors" ...We do not demand of legislatures 'scientifically certain criteria of legislation.' (Emphasis added).

Amicus submits that it is not irrational to define minors as under age 17 or to determine that exposure to materials defined in the statute as "harmful to minors" is harmful and is a species of unprotected obscenity.

[13] Id. At 641-642.

II. THE TERMS 'COMMERCIAL PURPOSES' AND 'REGULAR COURSE OF BUSINESS' IN COPA ARE NOT OVERBROAD.

Amicus submits that the Third Circuit erred in holding that the "Commercial Purposes" section of COPA is not narrowly tailored because it "imposes content restrictions on a substantial number of 'commercial,' non-obscene speakers" and exposes "too wide a range of Web publishers to potential liability."[14]

Specifically, *Amicus* contends that the court erred by holding that the term regular course of business, which is part of the definition of "Commercial Purposes,"[15] "does not narrow the scope of speech covered because it does not place any limitations on the amount, or the proportion, of a Web publisher's posted content..."[16]

To add such "amount" or "proportion" language to the statute as a way to narrow the definition of "regular course of business" would be to provide pornographers with a loophole to exploit in order to disseminate their material.

To follow the Third Circuit's logic would mean that a Web site that devotes the vast majority of its content for example to video games, which tends to attract children, should be permitted to disseminate harmful to minors'

[14] *ACLU v. Ashcroft*, 3rd Cir., *supra*, at 256-257.
[15] Child Online Protection Act, H.R. 3783 § 231 (e) (2) (A) Commercial Purposes - A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications." and (B) "'engaged in the business' means that the person ...devotes time, attention, or labor to such activities, as a regular course of such person's trade or business..."
[16] *ACLU v. Ashcroft*, *supra*, at 257.

material provided it's only a fraction of the Web site's content.

In fact, a similar tactic is used by adult bookstores in some municipalities which have zoning laws that define an adult bookstore as one that displays a certain percentage or proportion of adult material. To circumvent the law, some adult bookstores stock up on non-pornographic material when in fact its main business consists of the sale of pornographic material.

If "amount" or "proportion" language is included in COPA, a similar situation would result – pornographers would simply circumvent the law and "stock up" on material deemed not harmful to minors in order to publish harmful to minors' material.

Furthermore, in *Palmer v. Hoffman*, 318 U.S. 109, 115 (1943), this Honorable Court defined the term "regular course of business," without finding it necessary to impose an "amount" or "proportion" in the definition. The *Palmer* Court held that: "'regular course' of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business."

This seems to indicate that the term's definition must be determined on a case-by-case basis, factoring in the nature of the individual business and its methods of conducting itself as a business.

In 18 U.S.C.S. §1466 the term "engaged in the business" is also used and defined. Section 1466 – which

includes a definition of "engaged in the business" that is virtually identical with COPA's – has been upheld.[17]

In *U.S. v. Skinner*, the 6th Circuit upheld §1466's term "engaged in the business" and stated, "(T)he phrases 'engaged in the business' and 'regular course of trade or business' are subject to common sense definitions and are not vague."[18]

The *Skinner* court also quoted *United States v. Gross*, 313 F.Supp. 1330, at 1333 (1970), *aff'd*, 451 F.2d 1355 (7th Cir. 1971) with the following:

> (T)here should be no doubt in the minds of men of common intelligence that..."business" is that which occupies time, attention and labor of men for the purposes of livelihood or profit.

Amicus would like to point out that COPA includes the words "time, attention, or labor" to define "engaged in the business."

---

[17] *U.S. v. Skinner*, 25 F.3d 1314, (6th Cir. 1994), and *Eckstein v. Cullen*, 803 F. Supp. 1107, (E.D. Va. 1992). The *Eckstein* court adjudicated the definition of obscenity, not the term "regular course of business," however, it did uphold Section 1466, which includes the term "regular course of business." The court at 1112 states: "(I)t is clear that plaintiff's vagueness challenge to the federal obscenity statute must fail. Section 1466, which prohibits the selling of obscene matter, incorporates the *Miller* definition of obscenity. As such, the statute defines obscenity clearly enough to afford plaintiff, a 'person of ordinary intelligence', a 'reasonable opportunity to know' which sexually explicit magazines she is prohibited from selling in the future. *Grayned v. City of Rockford*, 408 U.S. 104 at 108; see also *Vernon Beigey, Inc. v. Traxler*, 790 F.2d 1088, 1093 (4th Cir. 1986) (regulated materials need not be defined with 'ultimate, god-like precision'); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 at 60 (1989)."

[18] *U.S. v. Skinner*, *supra*, at 1318.

One such common sense definition can be found in Webster's Dictionary,[19] which has as its first definition of the word business, "One's regular employment, profession, occupation." It is clear then that the dictionary definition for the word "business," one that is authoritative for common usage, defines it as activity or work done on a "regular" basis.

Another definition can be found in Black's Law Dictionary, 1451 (4th ed. 1968), which defines "Regular Course of Business" as a term that "(R)efers to habitual or regular occupation that party is engaged in with view of winning livelihood or some gain, excluding incidental or occasional operations arising out of transaction of that business; to normal operations which constitute business."[20]

And in the 1999 edition of Black's Law Dictionary, the term "Course of Business"[21] is defined as "The normal routine in managing a trade or business."

Interestingly, no "amount" or "proportion" language is included in any of these dictionary definitions.

Furthermore, the term "regular course of business," has been well defined by case law,[22] and in none of those

[19] New Webster's Dictionary and Thesaurus of the English Language 132 (1992).

[20] Under this definition, Black's Law Dictionary cited *Sgattone v. Mulholland & Gotwals*, 290 Pa. 341, 138 A. 855 (Pa. Sup. Ct. 1927) and *Passarelli v. Monacelli*, 121 Pa.Super 32, 183 A. 65 (Pa. Super. Ct. 1936). Please not that the *Sgattone* court, at 347, stated: "if the work was in the regular course of his business, by which is meant during the normal operations which constitute it." (Emphasis added)

[21] Black's Law Dictionary 356 (7th ed. 1999). The term "Regular Course of Business" is cross-referenced with the term "Course of Business."

[22] *Blake v. Wilson*, 268 Pa. 469 at 479, 112 A. 126, (1920): "...regular course of business can only refer to the experience and custom in the

cases did the court find it necessary to use "amount" or "proportion" language in its definition.

As the cases[23] define it, the phrase "regular course of business" means "normal operations" or "habitual or regular occupation" or conduct or activity that is engaged in "regularly."

As such case law indicates, the term is *not* used to refer to activity that occurs on an occasional[24], exceptional, variable or incidental basis, but instead connotes *deliberate activity conducted as a normal part of operations* and occurring *on a regular or steady basis.*

Therefore, the Third Circuit's notion[25] that the statute may reach nonprofit organizations and informational Web sites that occasionally or incidentally disseminate such material is stretching the term "regular course of business" beyond its established legal definition.

conduct of the business as is of usual, if not daily, occurrence and observation";
Guillara v. Liquor Control Commission, 121 Conn. 441 at 445, 185 A. 398 (1936): "Another equally recognized meaning of 'regular' is 'steady or uniform in course, practice, or occurrence; not subject to unexplained or irrational variation.' (Webster's New International Dictionary)"; *Gooden v. Mitchell*, 41 Del. 301, 21 A.2d 197 (1941); *Vescio v. Pennsylvania Electric Co.*, 336 Pa. 502, 9 A.2d 546 (1939); *Scanlon v. Hartman*, 282 Ore. 505, 579 P.2d 851 (1978); *Cochrane v. William Penn Hotel*, 140 Pa. Super. 323, 13 A.2d 875 (1940))

[23] See footnotes 18 and 19.

[24] *Callihan v. Montgomery*, 272 Pa. 56, 115 A. 889 (1922). The court, at 72, stated: "The legislature evidently intended, by the use of the words 'regular course,' to give them some definite significance and the most natural meaning is that they refer to the normal operations which regularly constitute the business in question, excluding incidental or occasional operations arising out of the transaction of that business, such as, now and again..."(Emphasis added)

[25] *ACLU v. Ashcroft, supra*, at 257.

To illustrate what the Third Circuit considers to be COPA's prohibition of protected speech for adults, the court used an example of a medical information Web site that publishes a weekly column on sexual matters, stating that this publisher "might well" be liable under the statute.

The court's reasoning on this issue is faulty precisely because the statute only applies to material that is "designed to appeal" to the "prurient interest"[26] and lacks "serious literary, artistic, political, or scientific value,"[27] albeit with respect to minors, however, adults can still access the material, and should the material be artistic, literary or scientific speech for minors it would not be prohibited by the statute.

The Circuit Court failed to take into account that the statute imposes "restricted access" on minors not on adults. The statute does not ban – or in the words of the Third Circuit "prohibits" – protected expression for adults, it simply aims to screen such material from a minors' access via credit card information or age verification.

Following the Third Circuit's reasoning to its final conclusion, some other harmful to minors' laws would also be unconstitutional due to their restricted access for minors, simply because they impose some slight burden on adult access. For example, the local so-called "brown wrapper"[28] laws, which require opaque covers or blinder racks over pornographic magazine covers.

On this issue, the Circuit Court erred by focusing on sections of the statute without considering the statute as a

[26] COPA, *supra*, § 231 (e) (6) (A).
[27] COPA, *supra*, § 231 (e) (6) (C).
[28] See *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983) and *Upper Midwest Booksellers Assoc. v. Minneapolis*, 780 F.2d 1389 (8th Cir. 1985)

whole and without taking into account the overall design and purpose of the statute.

Furthermore, the issue of narrow tailoring should not even arise because a harmful to minors' statute should not be adjudicated on a strict scrutiny basis, which is the standard for protected speech. This Honorable Court in *Ginsberg*[29] characterized harmful to minors' material as variable obscenity and said, "Obscenity is not within the area of protected speech or press. *Roth v. United States*, 354 U.S. 476, 485."

The *Ginsberg* Court continued with:

> The three-pronged test of subsection 1 (f) for judging the obscenity of material sold to minors under 17 is a variable from the formulation for determining obscenity under *Roth* stated in the plurality opinion in *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418.

Amicus further contends that the Third Circuit is demanding "god-like precision"[30] in COPA's language such that if the same level of precision were universally applied it would render nearly every statute unconstitutional, since language by its nature has practical limitations.

Also, this Honorable Court has recognized the reality that "any form of a criminal obscenity statute" may have some chilling effect on the sale of First Amendment material, but that, "The mere assertion of some possible self-censorship resulting from a statute is not enough to render an

[29] 390 U.S. 629 at 635 (1968)
[30] *Miller v. California*, *supra* at 28.

antiobscenity law unconstitutional under our precedents." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 49 (1989).

The *Fort Wayne* Court at 49 also stated:

> But deterrence of the sale of obscene materials is a legitimate end of state antiobscenity laws, and our cases have long recognized the practical reality that 'any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene.' *Smith* v. *California*, 361 U.S. 147, 154-155 (1959). Cf. also *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 706 (1986).

In conclusion, the term "regular course of business" has been upheld as a definite term capable of common sense interpretation and that it in essence means *deliberate activity* conducted as a *normal part of operations* and *occurring on a regular basis*. None of the cases suggested imposing "amount" or "proportion" language as a way of clarifying the term's meaning.

It has also been held that the term "regular course of business" gives the "person of ordinary intelligence"[31] a "reasonable opportunity to know"[32] the proscribed conduct and the definition is not so vague that the common man would not be able to understand what the term means. Therefore, the contention that a occasional,[33] accidental or incidental publication would fall within the statute's reach defies both the common sense understanding of the phrase

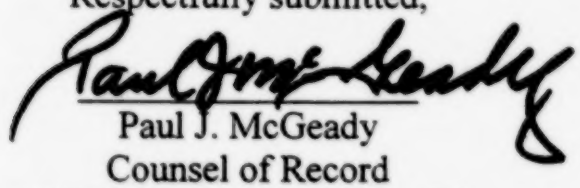
[31] *Eckstein v. Cullen, supra*, at 1112.
[32] *Eckstein, supra.*
[33] *Callihan v. Montgomery, supra.*

"regular course of business" and the body of case law that has defined the term.

CONCLUSION

For all of the aforementioned reasons, *amicus* prays that this Honorable Court reverse the judgment of the court below or in the alternative, remand for additional consideration and study.

Respectfully submitted,



Paul J. McGeady
Counsel of Record
475 Riverside Drive, Suite 239
New York, New York 10115
Attorney for *Amicus Curiae*
Morality in Media, Inc.
(212) 870-3232

Mary McNeill
Of Counsel

November 25, 2003

151